

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
Implementation of Section 621(a)(1) of)	
the Cable Communications Policy Act of 1984)	MB Docket No. 05-311
as amended by the Cable Television Consumer)	
Protection and Competition Act of 1992)	

COMMENTS OF CLAY COUNTY, FLORIDA

These Comments are filed by Clay County, Florida (hereinafter referred to as the “County”) in response to the Federal Communications Commission’s (hereinafter “FCC” or “Commission”) Notice of Proposed Rulemaking (“Cable Franchising NPRM” or “NPRM”).¹ The NPRM specifically addresses the implementation of Section 621(a)(1) of the Communications Act of 1992, which provides that “A franchising authority...may not unreasonably refuse to award an additional competitive franchise.”² Clay County has not unreasonably refused to award additional competitive cable franchises. In fact, the County has encouraged and sought additional competitive cable providers, since competition promotes low cable rates and because competition enhances customer service among competitors.

It is the County’s position that local governments are the most qualified entities to ensure the proper issuance of cable franchises for new entrants into the video services field on a timely basis, while ensuring the achievement of Congressionally-stated policy goals, including responsiveness to local community needs. In support of this position, the County would like to inform the Commission about the recent history of cable television franchising in the County’s jurisdiction, and to respond to certain positions taken and questions posed by the Commission in its NPRM.

Introduction

The local cable franchising process promotes competition by giving equitable opportunities to *all providers* who want to use the rights of way to provide video service. Creating an exception for telephone companies that want to offer video service, by exempting them from requiring a franchise agreement, creates an unnecessary competitive advantage for

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-189, Notice of Proposed Rulemaking (released November 18, 2005).

² See 47 U.S.C. §541(a)(1).

these companies. Local cable franchising ensures that providers are permitted access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including maintenance and upgrade of facilities, are undertaken in a manner which is in accordance with local requirements. Local cable franchising also ensures that the County's local community's specific needs are met and that local customers are protected. Without the franchising process, the County would be unable to provide this important supervisory function.

Congress did not intend for the Commission to preempt or supersede local government's franchising authority. Congress delegated specific powers to local franchising authorities which are not anti-competitive as some new entrants assert. The Cable Act acknowledges that municipalities are best able to determine a community's cable-related needs and interests. Accordingly, it would not be appropriate for the Commission to question the County in its identification of such needs and interests. The House Report states:

It is the Committee's intent that the franchise process take place at the local level where County officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.³

Furthermore, in *Union CATV v. County of Sturgis*, the Court concluded that, "judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests..."⁴ There is no reason in fact or law supporting the Commission's implementation of a different standard from that of the court. Thus, franchising should remain at the local level and any unreasonable denials should be reviewed by the judiciary.

The County has an interest and the right, delegated by Congress to prevent economic redlining, to establish and enforce customer service standards and to ensure the provision of adequate public, educational and governmental access channel capacity, facilities or financial support. Furthermore, for the minority of communities that may abuse their authority, the solution is not to undermine the entire franchising process. There is no need to create a new Federal bureaucracy in Washington to handle matters of specifically local interest.⁵

3 See H.R. REP. NO. 98-934, at 24, reprinted in 1984 U.S.C.C.A.N. at 4661.

4 See *Union CATV v. County of Sturgis*, 1997 FED App. 0075P (6th Cir.).

5 The County's proposed franchising process ensures that customer service complaints, in most cases are handled on a timely basis. The County has a rapport with the cable operator to ensure that issues are resolved. This type of relationship is a direct result of the local franchising process. It is inconceivable that a state or federally held franchise with dispute resolution maintained at the state or federal level is going to be comparable to the current service standards in the County. Finally, the Commission does not have the staff, budget or resources for handling complaints in such a timely manner.

The Franchising Process

Initial Franchise

Cable service cannot be provided unless there is a cable franchise granted by the franchising authority.⁶ “Franchise” means the “*non-exclusive*” right granted by the County to a Franchisee in a Franchise Agreement to construct, maintain and operate a Cable System to provide Cable Services under, on, and over Streets, roads and any other public ways, rights-of-ways, or easements within all or specified areas of the County...” The County is empowered by the cable television regulations of Title 47 of the United States Code to act as a Local Franchising Authority (LFA) with all of the powers and authority that status provides, including but not limited to negotiating and granting cable television franchises.

The public policy is that cable television regulations should include franchise procedures and standards which encourage the growth and development of cable systems and assure that cable systems are responsive to the needs and interests of the local community; and should promote competition in cable communications and minimize unnecessary regulation of cable systems.⁷ Accordingly, an LFA may not unreasonably refuse to award a competitive cable television franchise.⁸

A cable franchise functions as a contract between the local government, operating as the local franchising authority, and the cable operator. Like other contracts, its terms are reasonably negotiated. Under the Federal Cable Act it is the statutory obligation of the local government to determine the community's cable-related needs and interests and to ensure that these are addressed in the franchising process. However derived, whether requested by the local government or offered by the cable operator, once the franchise is approved by both parties the provisions in the franchise agreement function as contractual obligations upon both parties.

The County is authorized to regulate the construction, installation, operation and maintenance of Cable Television Systems pursuant to federal, state and local law. The County's proposed franchise provides that changes in law which affect the rights or responsibilities of either party under the Franchise agreement will be subject to and shall be governed by the Communications Act, and any other applicable provision of federal, state or local law.

Public Hearing

Local government officials encourage competition and new technologies since competing technologies and companies result in tangible benefits to the County and its residents. Public hearings provide an opportunity for residents, government officials and providers to voice their interests and concerns.

Florida law requires that no local government may grant a cable franchise unless it does so after holding a public hearing in which it considers the economic impact upon private

⁶ See 47 U.S.C. §541(d).

⁷ See 47 U.S.C. § 521.

⁸ See 47 U.S.C. § 541(a)(1).

property, the public need for the franchise, the capacity of the public rights of way to accommodate the system, the present and future use of the public rights of way to be used by the cable system, the potential disruption to existing users of the rights of way, the financial ability of the franchise applicant to perform, societal interests generally considered in cable television franchising, and any other substantive or procedural matters which may be relevant to consider.⁹

While a franchise is negotiated by the local government as a contract, the process provides the cable operator additional due process rights, and consequently additional obligations on the local government.

Clay County exercises its franchising authority over the incorporated area of the county pursuant to Ordinances adopted by the board of County Commissioners. All Ordinances require readings and public hearings which must be advertised 10 days in advance.

Local Franchising/Local Oversight

If telephone providers, such as SBC, AT&T and Verizon are permitted to offer cable service without first obtaining a cable franchise from an LFA, these providers will be exempt from local oversight and will be less accountable to the local communities in which they operate than the cable systems with which they will be competing. This would be competitively unfair and harmful to local communities and their residents who would lose the ability to manage the rights of way. Such local oversight provides important consumer and public protections.

The County is the most familiar with the local needs of its residents. Establishing and ensuring compliance with local building and zoning codes, and public safety regulations are performed at a local level. For example, the County's proposed Cable Ordinance provides,

A Franchisee shall, at its expense, protect, support, temporarily disconnect or relocate in the same Street or other public place any of its property when required by reason of traffic conditions, public safety, Street closing, Street construction, change or establishment of Street grade, installation of sewers, drains, water pipes, power or signal lines owned by the County or any other utility provider in the County.

Accordingly, the Commission cannot bypass the County's franchising process by considering establishing rules applicable only to telephone companies seeking to use the County's rights of way to offer a video product. The effect of these rules would be to usurp the statutory process established by Congress for cable franchise renewals to ensure that local needs are met.

Florida's Level Playing Field Statute

The public policy of the State of Florida is that cable television LFAs should grant overlapping franchises under terms and conditions which are not more favorable or less

⁹ See Fla. Stat. § 166.046(2).

burdensome than those of other franchises.¹⁰ Furthermore, section 166.046(5) provides “Nothing in this section shall be construed to prevent any...County considering the approval of an additional cable service franchise in all or any part of the area of such...County from imposing additional terms and conditions upon the granting of such franchise as such...County shall in its sole discretion deem necessary or appropriate.”

Cable Franchising in Clay County, Florida

Community Information

Unincorporated Clay County has a population of approximately 157,142 people. The Unincorporated areas of the County are served by Comcast, Time Warner, Galaxy and PDQ cable. On November 22, 2005 the County consented to the assignment of the Time Warner Franchise to a wholly owned subsidiary of Comcast.

Competitive Cable Systems

Unincorporated Clay County is currently served by four different cable operators: Comcast, Time Warner, Galaxy and PDQ. However, the potential for competition represented by the presence of four operators is about to evaporate. Comcast is in the processes of acquiring the Time Warner system, and it is the understanding of County staff that Comcast is considering the acquisition of one or both of the smaller operators. Thus, in the near future, the County will in all likelihood be served by only one operator as a result of industry activity, and not as a result of any barriers to entry established by the County. However, should other providers wish to provide cable serve in Clay County, the proposed Ordinance sets forth application procedures and content. Consistent with applicable federal and state law, the County’s Ordinance expressly prohibits the grant of exclusive franchise.

Clay County’s Current Franchise

Clay County is currently served by four different operators serving, in general, different areas of the County and governed by different franchises. The largest operators, Comcast and Time Warner, have been providing service pursuant to franchises which expired in 2002 and 2004 respectively. While the County had been actively pursuing renewal negotiations with the two operators, it had not been successful in reaching an agreement that would have satisfied the County’s interest in receiving franchise services and benefits comparable to other communities in the state. Upon receipt of the FCC 394 application requesting the County’s approval of the assignment of the Time Warner franchise to Comcast, County staff advised both operators that it did not believe that there was a legal basis, nor was it in the public interest, to recommend approval of a transfer of one expired franchise to the holder of another expired franchise. As a result, the County and Comcast negotiated a conditional approval of the transfer conditioned upon agreement to the terms and conditions of a renewal by February 28, 2006 (98 days after the date of the Board of County Commissioners approval of the transfer).

¹⁰ See Fla. Stat. § 166.046(3).

Solely as a result of the County's right to exercise authority over the transfer proceeding was it in a position to incentives the cable operator to finalize a renewal agreement, pursuant to which the County and its residents will be entitled to benefits and services commonly provided to other communities including, but not limited to, customer service, government access channels, system upgrades and interconnection among cable systems. The benefits and services discussed below are illustrative of those incorporated in the proposed non-final draft cable ordinance and franchise which the County expects to finalize with Comcast at the Board of County Commissioners meeting scheduled for February 28, 2006. Absent the opportunity to enter into a renewal agreement pursuant to the Cable Act, Clay County and its residents will be deprived of the benefits and services discussed below.

Customer Service

Because service issues are local, customer service must be handled at the local level. These complaints are made and addressed within the community. There are thousands of customer service complaints across the country, which are addressed at the local level. The State or the Commission is simply not equipped with handling the sheer number of these customer service complaints.

The County's proposed Franchise provides that the Franchisee agrees to comply with and to implement and maintain any practices and procedures that may be required to monitor compliance with customer service requirements set forth in the County's Cable Television Ordinance which applies to all cable operators. The Franchise requires compliance with the County's proposed Ordinance which sets forth specific obligations and fines in the event of non-compliance.

Below are a few customer service obligations which help the County ensure that the cable operator is treating the residents in accordance with federal standards and the terms agreed to in its Franchise.

- The Franchisee shall maintain all parts of its Cable System in good condition and in accordance with standards generally observed by the cable television industry
- Franchisee shall maintain a publicly-listed local, toll-free telephone number and employ a sufficient number of telephone lines, personnel and answering equipment or service to allow reasonable access by Subscribers and members of the public to contact the Franchisee on a full-time basis
- Excluding conditions beyond the control of the Franchisee, Franchisee shall begin working on service interruptions promptly and in no event later than twenty four (24) hours after the interruption becomes known regardless of whether or not Franchisee caused the interruption.

The proposed Ordinance also provides enforcement remedies where customer service requirements are not met. For example:

- The County Manager or designee shall have the authority to assess fines for violations of this Section in accordance with the schedule set out below or as otherwise

provided in a Franchise Agreement. The fines listed are to be assessed on a per violation basis with each day of a continuing violation constituting a separate violation, except for those customer service standards set forth in Subsections (d) and (e) above which are measured on a quarterly basis. With respect to such standards that are measured on a quarterly basis, the fines for such violations shall be assessed on a quarterly basis as follows; \$10,000 per quarter if the Franchisee falls below such standards by 10% or less; \$15,000 per quarter if the Franchisee falls below such standards by 20% or less and \$20,000 per quarter if the Franchisee falls below such standards by 25% or more. For example, if Franchisee has answered the telephone standards set forth in the Ordinance on a quarterly basis 75% of the time, instead of the 90% required herein, the quarterly fine shall be \$15,000.

- Single fine violations range from \$100 - \$500 per violation.
- Prior to assessing a fine, the County Manager shall mail to the Franchisee a written notice by certified or registered mail of the proposed fine, specifying the violation at issue. This notice may be combined with the written decision referred to in (b)(2) above and shall be referred to hereafter as the Assessment Letter. The Franchisee shall have thirty (30) days from the date of receipt of the Assessment Letter to file a written response to the notice of the County Manager.
- Any fine will commence as of the date of the last day of the applicable cure period, or if Franchisee challenges the assessment in a court of competent jurisdiction, within thirty (30) days of a final non-appealable decision that the assessment is valid. This fine shall constitute liquidated damages to the County for the violation and the County may enforce payment of the fine in any court having jurisdiction. It is the intent of the County to determine fines as a reasonable estimate of the damages suffered by the County or its Subscribers.

PEG

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, that channel capacity be designated for public, educational, or governmental use, channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.¹¹

Accordingly, LFAs have the right to establish franchise requirements regarding channel capacity for government and education access programming. Furthermore, an LFA may require assurances that the cable provider will provide adequate educational and government access channel capacity, facilities, and financial support.

The County will require the cable operator to provide capacity for public, educational, and/or governmental ("PEG") access channels on the cable system. As set forth in the proposed

¹¹ See 47 U.S.C. § 531(b).

Franchise Agreement, the cable operator is obligated to provide to the County of two channels for the exclusive use of the County for government and educational access use. Currently, the County does not have an exclusive government access channel. Furthermore, unlike many, if not most communities, Clay County has not received a capital grant or other support for government access. Under the proposed agreement, the cable operator will provide the County with a capital grant without which the County might not have the resources to purchase the equipment necessary to produce the programming it needs to deliver to its residents.

Service to Public Buildings and to Schools

The County's Franchise contains the following requirements:

Service to Public Buildings:

- Franchisee agrees to provide, at minimum, one (1) cable drop per floor per location and, upon request, any other County government building in the Franchise Area located within 125 feet of the Franchisee's distribution cable.

Service to Schools:

- Where Franchisee's plant is the closest Franchised cable operator to any accredited school (K-12) and the school is located within 125 feet of the Franchisee's distribution cable within the minimum density of at least twenty-five (25) dwelling units per mile measured from one (1) mile of the existing Cable System, Franchisee agrees to provide one free cable drop and installation and free Basic and expanded or Cable Programming Service Tier ("CPST" or the equivalent comprising the next level of programming service above the most basic tier) at no charge to those schools.
- Franchisee shall, upon request, provide accredited schools (K-12) located within one hundred twenty five (125) feet of the cable plant, one (1) standard installation of One (1) High Speed Internet service, one (1) cable modem, and regular service at no charge to the school or the County.

Build Out

Build out requirements ensure that there is a simple, objective, easily administered test of economic feasibility as to where cable service has to be available. Having a clear test helps to ensure that the cable company's facilities are extended into all neighborhoods meeting this test and that service is offered to all residents in such neighborhoods, regardless of race, age, income or other extraneous factors.

Since the test must be locally tailored so as to take into account local geography, demographics, and other factors which affect population density and ability to provide service, a test applied statewide or nationally would be ineffective. Since the rights of way are public property, maintained using public funds, the rights of way cannot be used in a discriminatory

fashion. It is the County's responsibility to ensure that public property is used to provide service wherever there is sufficient population density.

Finally, the County has a duty to ensure that modern communications services are offered broadly to as large a number of the residents of the County as reasonably possible, without regard to age, race, and income or other improper service criteria.

The County's proposed Franchise provisions have been negotiated with the cable operator, taking into consideration the cable operator's business needs, engineering and construction requirements and the need to provide access to service on a non-discriminatory basis. The Franchise agreement requires that the cable operator currently provide service to the following areas of the County:

In accordance with the Ordinance, upon request and payment of all, applicable charges, and provided that the requesting person gives Franchisee access to the premises in order to furnish, maintain and continue to offer Cable Service to that person, Franchisee shall, throughout the term of this Agreement, promptly furnish, maintain, and continue to provide all Cable Services distributed over the System to any person at the place of residence within the County where Franchisee's distribution plant is located within 125 feet of such residential location and there are at least twenty-five (25) homes per mile as measured from Franchisee's nearest distribution plant and where such residential location is not able to receive Cable Service by any other Franchised cable operator.

State-of-the Art

Given the rapid pace with which cable technology is advancing, the County recognizes that it can not adequately predict the specific capacity or services that will be required to maintain a state of the art system in the unincorporated area of the County. However, like other communities, the County recognizes that maintenance of a modern cable system is crucial to its economic and social development. Accordingly, the proposed Ordinance and the proposed Franchise require the cable provider to maintain a state of the art system in the County and provides for reporting requirements and enforcement mechanisms. Consistent with federal law, the County does not require the deployment any specific technology, it does however require that cable systems in the County to provide at minimum the products and services available to any community within the County, to any adjacent County and to the nearest major City, Jacksonville.

Insurance and Security/Bonding Requirements

The County has a duty to protect its residents by ensuring that obligations are met and injured members of the community are compensated if the provider should encounter financial difficulties or file for bankruptcy. The County's proposed Franchise agreement contains the following insurance and bonding requirements:

- Franchisee shall maintain liability insurance coverage insuring the County to the extent applicable and the Franchisee: worker's compensation and employer liability insurance to meet all requirements of Florida law and commercial general liability insurance with contractual coverage with respect to the construction, operation and maintenance of the Cable System, and the conduct of Franchisee's business in the County, in the minimum amounts of \$1,000,000 per occurrence, for bodily injury or death, broad form property damage liability, and insurance to cover infringement of copyrights
- Franchisee shall keep on file with the County certificates of insurance evidencing the above insurance coverage and evidencing that the County, its officers, boards, commission, commissioners, agents and employees are listed as additional insureds on the general liability policy.
- Franchisee shall, at its sole cost and expense, indemnify, hold harmless, and defend the County, its elected or appointed officials, employees, committees and boards, in accordance with the Ordinance.

Franchise Fees

With respect to payments by a franchisee, the Cable Act permits LFAs to collect up to 5% of gross revenues from cable providers as compensation for the use of public rights-of-way. However, in 2001, the State of Florida adopted the Florida Communications Services Tax ("CST") Simplification Act, which superseded and preempted the authority of municipalities and counties in Florida to directly levy or collect cable television franchise fees.¹²

Under the CST, providers of cable, telephone and other communications services remit the communications tax directly to the Florida Department of Revenue, which takes an administrative fee and remits the balance to the respective LFAs. Rates were established by the State for each taxing jurisdiction based upon historical revenues under prior franchise fee and taxing schemes with the intent that the jurisdictions would not receive net returns significantly different than they received collectively from the prior distinct funding sources.

Enforcement Mechanisms

In addition to the fines specifically set forth for violations of customer service standards and any other remedies available at law or equity, the Ordinance also provides remedies and procedures for enforcement of each and every provision of the Ordinance and a Franchise. The ability at the local level to enforce franchise obligations is critical. For example, upon completion of the transfer of the Time Warner franchise to Comcast the County, pursuant to the proposed Ordinance and franchise, will require that the former Time Warner subscribers have the ability to receive the same County government and education programming available to the Comcast subscribers, and that all subscribers throughout the unincorporated area of the County receive the same level of customer service and have access to the same products and services.

¹² See Fla. Stat. §§ 202.13(3), 202.20(2)(b)(1)(b), and § 202.24(1).

Responses/Comments to the Notice of Proposed Rulemaking

The Commission does not have the legal authority to issue rules which preempt LFAs authority.

Providers seeking to provide multichannel video service over upgraded local wireline networks have alleged that the local franchising process serves as a barrier to entry. Accordingly, the FCC seeks comment on how it should implement 47 U.S.C. § 541(a)(1), which provides that a franchising authority may not unreasonably refuse to award an additional competitive franchise. The County respectfully asserts that the Commission should not adopt rules which would preempt its duly-adopted Cable Television Ordinance, since to do so would conflict with Congress' intent and exceed the Commission's Congressionally-delegated authority. Any proposed Commission rule would interfere with the County's Congressionally-granted authority. The Cable Act states, in relevant part:

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter [nor] to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.¹³

It was the intent of the Cable Act to "preserve the critical role of municipal governments in the franchise process, while providing appropriate deregulation in certain respects... [and that] the franchise process take place at the local level where County officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs."¹⁴ Moreover, Congress provided that where LFAs treated franchisees unreasonably, franchisees had the right to seek judicial relief.¹⁵ Congress did not authorize the Commission to make rules preempting local laws which are not inconsistent with the Act, nor inserting itself into the local franchise negotiation process. Thus, any proposed Commission rule which would circumvent this process would be counter to Congress' express intent that franchising take place at the local level and that any unreasonable denials are reviewed by the judiciary.

The local franchising process is not unreasonably causing refusals of competitive franchise grants.

New providers, including Verizon AT&T and SBC are seeking to provide multichannel video service over upgraded local wireline networks so that they can offer a competitive "triple play" (voice, Internet and video) to cable operators' triple play. These providers want to circumvent the Cable Act's local cable franchising process via federal and state legislation and via Commission rules as reflected in this NPRM.

¹³ See 47 U.S.C. § 556(a)&(b).

¹⁴ See NPRM at n. 18, citing, H.R. Rep. No. 98-934 (1984).

¹⁵ See 47 U.S.C. § 555(a).

In Florida, these new providers, as telephone companies, have the legal right and ability to deploy an advanced network.¹⁶ However, in order to offer the video component, LFAs require a franchise agreement. In fact, a number of years ago, BellSouth had obtained a number of cable franchises which the company failed to build. Therefore, BellSouth never offered cable service even though they held a number of cable franchises.

For example, Verizon has stated that it will deliver its FiOS television service by constructing the system primarily as a telephone system, not subject to cable television franchise authority. Verizon argues that it may begin FTTP system construction at will, even in communities where it is not actively seeking a cable television franchise, because the system will be used to provide voice and data services, which is not regulated by cable television ordinances, regardless of a cable franchise. Therefore, Verizon has been deploying its FTTP network without having yet obtained video franchises from many of the LFAs in the communities in which they are building. In those communities, it can market and use this network to bring its phone and high-speed data products to consumers, and include its wireless product in the bundle. Its video product can join that bundle as Verizon obtains franchise agreements, but there is no legal impediment to construct and begin deriving income from its advanced system while it negotiates video franchise agreements with LFAs.

Thus, these new providers, as telephone companies have an advantage over cable providers since the telephone companies have independent right of way authority and may begin construction or upgrade their facilities without LFA regulation. However, cable operators are not permitted to begin system construction until the franchise agreement is negotiated and finalized.

Build-Out Requirements and Red-Lining

Build out requirements encourage competition and prevent red-lining of communities since these requirements prevent profit optimization by denying new providers the ability to select areas where high-margin customers may reside. LFAs have a congressionally-mandated duty to manage the rights of way to ensure certain members of the community are not denied access to service due to their race or income levels. Accordingly, a Commission rule preventing LFAs from imposing build-out requirements could perpetuate redlining.

Clay County, like many areas in the state of Florida is in the midst of rapid growth. Requirements for build out incorporated in the proposed franchise and the prohibition against discrimination set forth in the ordinance as well as the County's ability to enforce these obligations through the imposition of fines or liquidated damages are essential to support the area's economic development.

The County's response to Verizon's arguments

¹⁶ See Fla. Stat. §337.401.

Verizon has stated that the local franchising process takes too long due to inertia, arcane application procedures, bureaucracy or inattentiveness by LFAs arguing that it would have to negotiate with 10,000 LFAs in order to offer video service in its current service area. However, entrants, such as Verizon, with multi-use systems have two other options to offer video service without obtaining a franchise from LFAs: satellite and OVS. Furthermore, in the case of obtaining a franchising agreement for use of the rights of way, in Florida, Verizon will be able to reach a significant number of the population by dealing with a relative few LFAs with jurisdiction over the State's various areas of dense population.

Verizon also argues that that local franchising requirements can result in "outrageous demands by some LFAs" wholly unrelated to video services or franchising rationale. However, it is evident that the County's franchising process, with Adelphia illustrates that the parties were able to negotiate in good faith over the exact levels of support to be provided to the County and part of that process was the County's willingness to set forth its justifications for the requests being made.

Elected officials hear from all interested parties, and make a balanced judgment as to what level of support will be required, taking into account the LFA's future cable-related community needs and the provider's ability to make a reasonable profit on its investment in the community.

Conclusion

The County disagrees with the Commission's tentative conclusion that the FCC has the authority to ensure that LFAs not "unreasonably refuse" to award competitive franchises. Congress did not grant the Commission jurisdiction to directly implement §541(a)(1). Accordingly, the Commission does not have enforcement authority since this is a function of the federal judiciary.

As to whether the Commission should address actions at the state level if they are deemed to be unreasonable barriers to entry, the County opposes any such state legislation. There are adequate judicial remedies to redress any unreasonable barriers to entry. The Commission has no authority to preempt state statutes as the NPRM suggested.

Finally, the County agrees with the Commission's tentative conclusion, that it is not unreasonable for an LFA, in awarding a franchise, 1) to assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides; 2) allow a cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area, and 3) require adequate assurance that the cable operator will provide adequate access channel capacity, facilities, or financial support.

The County is concerned that its authority as an LFA not be decreased, either by FCC rule or by the Florida Legislature. Local cable franchising ensures that local cable operators are allowed access to the rights of way in a fair and evenhanded manner, that other users of the rights of way are not unduly inconvenienced, and that uses of the rights of way, including

maintenance and upgrade of facilities, are undertaken in a manner in accordance with local requirements. Local cable franchising also ensures that the County's specific needs are met and that local customers are protected.

In light of the foregoing, the County respectfully requests that the Commission does not interfere with local government authority over franchising or otherwise impair the operation of the local franchising process as set forth under existing federal law with regard to either existing cable service providers or new entrants. The Commission should not permit providers to simply circumvent the local franchising process.

Respectfully submitted this 10th day of February, 2006

Clay County, Florida



By: Counsel for Clay County, FL
Ila L. Feld & Eleni Pantaridis
Leibowitz & Associates, P.A.
One S.E. Third Avenue, Ste. 1450
Miami, FL 33131

cc: Fran Moss, Clay County, FL, Fran.Moss@co.clay.fl.us
NATOA, info@natoa.org
John Norton, John.Norton@fcc.gov
Andrew Long, Andrew.Long@fcc.gov